OCT 23 1980

MICHAEL RODAK, JR.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980
NO. 80-344

QUINAULT PACIFIC CORPORATION,
INTERNATIONAL PAPER COMPANY,
WHITE LUMBER SALES, INC., and
GOLD REY FOREST PRODUCTS, INC.
Petitioners,

versus

AETNA BUSINESS CREDIT, INC.,
JOHN C. PENNINGTON, TRUSTEE,
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT JOHN C. PENNINGTON, TRUSTEE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BRIEF OF RESPONDENTS JOHN C. PENNINGTON, TRUSTEE, and FREEMAN & HAWKINS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The Judgment of the Court of Appeals for the Fifth Circuit was entered on May 9, 1980. See Petitioners' Joint Appendix at 163. That Judgment affirmed the opinion of the United States District Court for the Northern District of Georgia, Atlanta Division, which is unreported. The District Court's opinion had affirmed an Order of the United States Bankruptcy Court, dated June 6, 1978.

QUESTIONS PRESENTED

Whether, based upon a review of the record in this case, the lower courts abused their discretion in awarding to Respondents John C. Pennington and Freeman & Hawkins legal fees incurred by reason of Petitioners' bad faith, vexatious and abusive conduct during the proceedings.

STATEMENT OF THE CASE

This controversy arises from the bankruptcy proceeding of Georgia Paneling Supply, Inc. (the "Bankrupt"), which, though a no-asset case, has been pending in the Northern District of Georgia since July 29, 1974. (Vol. I, R-123). The corporate Petitioners hold unsecured claims against the Bankrupt for goods sold on credit. (Vol. II, R-307-331). The individual Petitioner, W. Kent Bishop, is the attorney for the corporate Petitioners. Respondent John C. Pennington is the bankruptcy trustee ("Trustee") for the Bankrupt and was elected to that position by Petitioners. (Vol. I, R-123). Respondent Freeman & Hawkins is a law partnership that formerly served as the Trustee's counsel. Respondent Aetna Business Credit, Inc. ("AETNA") is a commercial finance company, which, during 1973 and 1974, financed the accounts receivable and inventory of the Bankrupt.

In July of 1975, Petitioners pursuaded the Trustee to sue Aetna and The C&S Bank ("C&S") to recover the value of the Bankrupt's property upon which Aetna and C&S had foreclosed their respective security interests. (Vol. I, R-124). The theory of recovery was that Aetna and C&S had received voidable transfers under the bankruptcy laws as the

result of their foreclosures. After reviewing the findings of a private investigator whom he had retained to develop the evidentiary support for his complaint, the Trustee determined that his claim against Aetna was not meritorious. (Vol. I, R-124-125). Accordingly, the Trustee agreed to dismiss his claim against Aetna for his costs ($350) and requested the Bankruptcy Court to permit him to settle on that basis, leaving him free to pursue what he felt was a meritorious claim against C&S. (Vol. I, R-124-125).

Despite the vigorous objections of Petitioners, the Bankruptcy Court after a hearing approved the proposed settlement on June 16, 1976, and denied the Petitioners' request to remove the Trustee from office for proposing the settlement. (Vol. I, R-125; see Petitioners' Joint Appendix at 66). On appeal the District Court affirmed the Bankruptcy Court's approval of the settlement. (Vol. III, R-125). However, by a separate order, the District Court permitted Petitioners to intervene into the Trustee's lawsuit to assert their own claims against Aetna and C&S.

After the District Court's approval of the settlement, Petitioners filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure which requested that the settlement be nullified on the basis of alleged newly-discovered evidence. (Vol. I, R-126). Their alleged newly-discovered evidence demonstrated, they argued, that Aetna never made a loan to the Bankrupt and therefore foreclosed upon the wrong company. Shortly before the hearing scheduled on their Rule 60(b) motion, Petitioners requested the Bankruptcy Court to continue the hearing for 35 days, to prohibit counsel for Aetna from participation at the

hearing, to "incorporate by reference" as evidence in the hearing all discovery taken in the Trustee's lawsuit and to set aside "two to three weeks" of the Court's calendar to devote to the hearing. (Vol. I, R-139). The Bankruptcy Court denied these several requests of Petitioners (Vol. I, R-139), who on the morning of the hearing filed with the District Court a notice of appeal and request for immediate review (Vol. I, R-141) and filed with the Bankruptcy Court a motion for a stay of the hearing and for a reassignment of the case to another bankruptcy judge who could set aside two weeks of his calendar for the hearing. (Vol. I, R-141). The Bankruptcy Court denied Petitioners' motion and the District Court denied Petitioners' appeal as "without merit" and "frivolous." (Vol. I, R-141). Following a two-day hearing on Petitioner's Rule 60(b) motion and the submission of documentary evidence (Vol. I, R-141), the Bankruptcy Judge on December 20, 1977, denied their motion and the District Court affirmed that denial on appeal. (Vol. I, R-127).

Respondents thereafter applied to the Bankruptcy Court for an assessment of legal expenses incurred by them on the grounds that Petitioners' efforts to frustrate the $350 settlement were in bad faith, vexatious and frivolous. After a hearing that occurred over a six-day period (Vol. I, R-121), the Bankruptcy Court entered an order assessing Petitioners attorney's fees incurred by Respondents. (Vol. I, R-220). On August 30, 1978, the District Court affirmed the assessment (Vol. I, R-159) and thereafter reaffirmed its decision upon Petitioners' motion for reconsideration. The Bankruptcy Court entered detailed findings of Petitioners' misconduct,

which, among other things, consisted of their having willfully misrepresented as newly-discovered certain evidence that they had had for almost two years; having asserted legal positions as supported by authority when such positions were contrary to well-settled authority; having frivolously appealed from every interlocutory and final order entered in the case, including an appeal to the Court of Appeals of an order assessing $131.50 of transcript costs against them (Vol. I, R-126), which was peremptorily dismissed (Vol. I, R-127); having refused to adhere to verbal instructions from the Bankruptcy Court during hearings; and having taken contradictory factual positions in their Rule 60(b) motion (e.g., Aetna never loaned money to the Bankrupt) and in their subsequently filed intervenors' complaint in the Trustee's lawsuit (e.g., Aetna did advance money to the Bankrupt).

REASONS FOR DENYING THE PETITION

I. The Courts Below Fully Considered and Correctly Decided the Issues

An equity court has the unquestioned power to award attorney's fees against a party who has "'acted in bad faith, vexatiously, wantonly, or for oppressive reasons...' F.D. Rich Co., 417 U.S., at 129, 94 S.Ct. at 2165 (citing Vaughan v. Atkinson, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed. 2d 88 (1962)"; Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 258-259, 95 S.Ct. 1612, 1622. See also In Re Swartz, 130 F.2d 229 (7th Cir. 1942) and Hutto v. Finney 98 S.Ct. 2565 (1978) p. 2573, n.14. The language of §2(a) of the Bankruptcy Act (11 U.S.C.A. §11) invests the courts of bankruptcy with jurisdiction in

equity. See Collier on Bankruptcy (14th ed.) ¶2.09 and the cases cited therein. In Swartz, supra the United States Supreme Court upheld the award of attorney's fees by a Bankruptcy Court. The Fifth Circuit has recently upheld the award of fees by a Bankruptcy Court where a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. See, Matter of Love, 577 F.2d. 344 (1978), and Creel v. Birmingham Trust Nat. Bank, 577 F.2d 352 (1978).

The award of attorney's fees may also be assessed against the parties' counsel, individually. Such award may be predicated upon either or both of two grounds. Bankruptcy Rule 911, which is an adaptation of Rule 11 of the Federal Rules of Civil Procedure states in relevant part:

> "The signature of an attorney on any pleading, motion or application served or filed in a bankruptcy case constitutes a certificate by him that he has read the paper; that to the best of his knowledge, information and belief, there is good ground to support it; and that it is not interposed for delay or other improper purpose. ... For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted."

§1927 of Title 28, U.S.C. reads as follows:

> "Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who so multiplies the proceedings in

> a case as to increase costs unreasonably and vexatiously may be required by the Court to satisfy personally such excess costs."

The courts have invoked the provisions of 28 U.S.C. §1927 against counsel where it has been found that the action was frivolous or was brought for harassment, delay or some other improper purpose. See, E.G. Acevedo v. Immigration and Naturalization Service, 538 F.2d. 918 (2d Cir. 1976); Suel v. Addington, 465 F.2d. 889 (9th Cir. 1972); Browning Debenture Holders Committee v. DASA Corp., 560 F.2d. 1078 (2d Cir. 1977).

As noted by the Bankruptcy Court in this case in its Memorandum in support of the order assessing fees, an assessment of expenses should be reserved for "extraordinary" cases. The Bankruptcy Court appropriately found that this was such an "extraordinary" case and that an assessment of expenses was not a punishment of Petitioners for the exercise of their legal rights, but instead correctly shifts to them expenses of Respondents caused by their conduct and procedural tactics found to be taken in a frivolous, bad faith, vexatious and dilatory manner. (Petitioners Joint Appendix, p. 134).

The Courts below fully considered the issues raised in the instant Petition. The judgment of the Bankruptcy Court was entered after a hearing that consumed the better part of six days (Vol. I, R-121) and was affirmed on appeal by the District Court, which reaffirmed its decision upon Petitioners' request for reconsideration. (Vol. I, R-159, R-34). The Court of Appeals for the Fifth Circuit, after a full briefing of the

issues and oral argument, affirmed the judgments below on May 9, 1980, and denied Petitioners' petition for reconsideration on June 3, 1980.

II. There is No Conflict Among the Court of Appeals

That a federal court has the inherent power to assess attorney's fees against a party and his attorney for abusive and bad faith conduct in the course of litigation is the holding of this Court in Roadway Express, Inc. v. Piper, U.S. , 100 S.Ct. 2455, 65 L.Ed. 2d. 488 (1980). This ruling would effectively resolve any conflict among the Circuits, if indeed one ever existed. Furthermore, Petitioner, while alluding to a conflict among the Circuits, cites no authority and does not even make the argument that such a conflict exists.

III. No Issues of Public Importance Are Presented by This Case

The decision in this case is based upon and amply supported by facts and circumstances peculiar to it, all of which have been thoroughly sifted and reviewed by the lower courts. This Court should refrain from reviewing cases which turn on factual questions and which are devoid of any issues of public importance.

Petitioners brief is principally devoted to a tedious rehashing of facts largely at variance with the findings of the Bankruptcy Court. Petitioners' allegations of misconduct are untrue and without support in the record. The account of the facts set forth in the brief of the Respondent, Aetna Business Credit, Inc., is entirely accurate.

Moreover, even if Petitioners' allegations of fact were taken to be true, they are legally insufficient as a basis for recusal or disqualification of the Bankruptcy Court.

IV. Petitioners Seek to Raise an Issue Not Raised in the Court of Appeals

Petitioners contend that they are entitled to have the issue of their liability for the payment of the Respondent's attorney's fees tried before a jury, citing cases dealing with criminal contempt which are clearly not applicable here. Petitioners never sought a jury trial and are raising this issue in their Petition for Writ of Certiorari for the first time. Accordingly, this Court should not consider this issue.

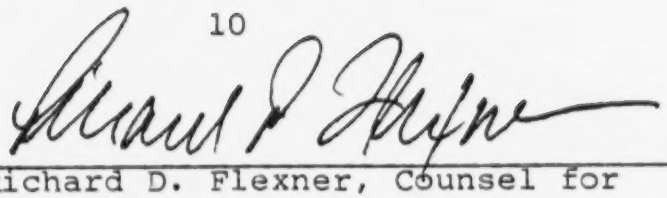
CONCLUSION

For the reasons stated above, it is requested that Petitioners Petition for a Writ of Certiorari be denied.

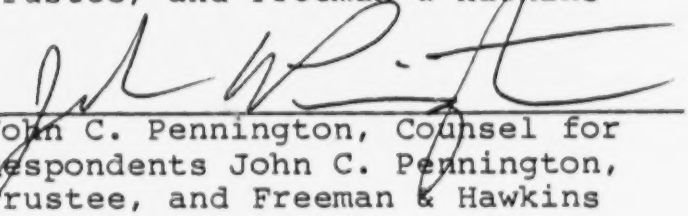
Respectfully submitted,

Howell Hollis, III, Counsel of Record for Respondents John C. Pennington, Trustee, and Freeman & Hawkins

Douglas L. Cronkright, Counsel for Respondents John C. Pennington, Trustee, and Freeman & Hawkins



Richard D. Flexner, Counsel for
Respondents John C. Pennington,
Trustee, and Freeman & Hawkins



John C. Pennington, Counsel for
Respondents John C. Pennington,
Trustee, and Freeman & Hawkins

AFFIDAVIT OF SERVICE

STATE OF GEORGIA

COUNTY OF FULTON

John C. Pennington, being first duly sworn, deposes and says that he served three copies of the foregoing Brief upon counsel for Petitioners and three copies of said Brief upon counsel for Respondent Aetna Business Credit, Inc. by depositing same in the United States Mail, with first class postage prepaid, addressed as follows:

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and that all parties required to be served with a copy of the foregoing Brief have been served.

This 6th day of October, 1980.

John C. Pennington

Sworn to and subscribed before me, this 6th day of October, 1980.

S. Dale Wilkes
Notary Public

Notary Public, Georgia, State at Large
My Commission Expires May 14, 1983